MOTION FILED

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No. 02-638

In The

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court of Appeal of California, Fourth Appellate District

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the Petitioner to submit this brief as amicus curiae. The letter of consent has been filed with the Clerk of the Court.[1] Respondents did not reply to NAHB's request for consent.

The NAHB respectfully moves this Court for leave to file its amicus brief in support of Petitioner. NAHB wishes to bring to the Court's attention a conflict exemplified by Petitioner's case: confusion exists in numerous courts below as to the proper application of *Dolan v. City of Tigard's* legal standard to legislatively-enacted development exactions, including impact fees. This Court's grant of the petition for a writ of certiorari would define the scope of *Dolan* as it pertains to all development exactions, thereby removing the uncertainty in the courts below.

The NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. The NAHB, therefore, is concerned with any judicial decision that calls into question the legal remedies available to NAHB's members, particularly when any such remedies are

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

restricted by a state or federal court. Protecting our members' fundamental constitutional rights, particularly involving matters related to takings and just compensation, has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

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SUMMARY OF ARGUMENT

By ruling that a legislatively-enacted development fee does not trigger *Dolan's* "heightened scrutiny" test,[2] the Court of Appeal of California, Fourth Appellate District, has further muddied the waters of one of the tributaries of takings jurisprudence. The Court of Appeal is not alone; much uncertainty exists in Federal and state courts below as to the "legislative-adjudicative" distinction relative to the application of *Dolan*. Further complicating the issue, some courts apply *Dolan* to government-imposed dedications or other physical exactions, yet refrain from applying *Dolan* to impact fees or comparable monetary exactions.

However, the safeguards of *Dolan's* heightened scrutiny test must apply equally to all exactions, because regardless of the source of the exaction, and irrespective of the physical-monetary distinction, the underlying property interests subject to the exaction are indistinguishable under the Constitution. In fact, the protections of the Fifth Amendment's takings clause, which extend to all private property interests, are blind to all purported distinctions.

Choosing not to extend *Dolan* to "legislatively" determined transportation mitigation fees, the Court of Appeal explains away the need for *Dolan's* heightened scrutiny by reasoning that "the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially." Apparently, the Court of

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[2] *See infra* at 6, for a discussion of the relationship between *Nollan's* "essential nexus" and *Dolan's* "rough proportionality" legal tests for evaluating the constitutionality of governmental development exactions. The tests, which require a heightened level of legal scrutiny for government-imposed development exactions, are hereinafter referred to as "*Dolan*" or "heightened scrutiny" tests.

Appeal is satisfied that this legislative enactment is imbued with a readymade buffer that will prevent against the type of regulatory leveraging that would otherwise beg for a *Dolan* analysis.

However, the Court of Appeal misses the mark. It ignores a glaring reality in the realm of land use and development law: most land use policy, which is made at the local level, is infused with a mixture of "legislative" and "quasi-adjudicative" decision-making. Development fees that are calculated and enacted "legislatively" are nevertheless applied on an individual, case-by-case basis; the risk of regulatory leveraging is present regardless of how the government entity or exaction is categorized. The safeguards of *Dolan's* heightened scrutiny test should not be sacrificed to an inexact distinction between local governmental bodies.

Moreover, the Court of Appeal notes that monetary exactions that are imposed on an individual and discretionary basis are worthy of a *Dolan* analysis but that the same fees applied "uniformly, generally, and ministerially" are not. The Court of Appeal intimates that the risk of governmental leveraging associated with the case-by-case adjudicatory imposition of monetary exactions is not pervasive in the context of legislatively-authorized, generally applicable fees.

But, to the property owner who is obligated to swallow his poison, regardless of the form of the exaction, or whether it is rendered legislatively or administratively, the potential hazard is the same: a taking is a taking. It matters not to him, or to the Constitution, the identity of the taker, nor the form of the taking. With the safeguards of *Dolan*, the property owner at least stands the chance of

avoiding being the proverbial owner who is "unreasonably forced to bear the regulatory burdens of many."[3]

For these reasons, this Court should grant certiorari to define the application of *Dolan*, which in turn would lend more certainty to the property development approval process.

REASONS FOR GRANTING THE WRIT

I. DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO DEVELOPMENT EXACTIONS REGARDLESS OF WHETHER AN EXACTION IS IMPOSED LEGISLATIVELY OR THROUGH A QUASI-ADJUDICATIVE PROCEEDING

"A city council can take property just as well as a planning commission can." This admonition from Justice Thomas's dissent in *Parking Ass'n of Georgia v. City of Atlanta* truly cuts to the heart of the debate over the application of *Dolan*. Recognizing that it makes no good sense to hold a takings analysis hostage based on the *type* of governmental entity responsible for the potential taking, Justice Thomas, with whom Justice O'Connor joined in dissent, spied the potential confusion in this area of the law well in advance of the instant case. *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S 1116, 1117-1118 (1995) (Thomas, J., dissenting from denial of certiorari).

Given the interlocking roles of local legislative and quasi-adjudicative bodies, the "distinction between

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[3] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 1119. In practice, scores of local land use decisions are made daily wherein the local decision-maker arrives at the decision after performing a hybrid of legislative, administrative, and quasi-judicial functions. The Court of Appeal, in withholding the application of *Dolan* to a legislatively-enacted transportation mitigation fee,[4] fails to recognize that local governments do not follow strict notions of separations of powers requiring independent legislative, executive, and judicial branches with distinct roles.[5]

In a well-researched article covering this area of the law, one commentator notes the frequency with which local legislative bodies perform various administrative functions and administrative bodies exhibit legislative qualities, thus rendering any formal distinctions "ineffective in practice." *See*, Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 261 (2000). Furthermore, disagreement even exists amongst the courts in determining which decisions are "legislative" and which are "adjudicative." *Id.* at 258.

To illustrate this point, the author uses the example of rezoning. Generally, the power to rezone is reserved to locally-elected legislative bodies. However, even though adopted by the legislative body like other legislation,

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[4] Please see, Petition For Writ of Certiorari, app. A-4.

[5] *See*, Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 Stetson L. Rev. 627 (1996), for an interesting discussion detailing how local legislative bodies may sit in an executive or a quasi-judicial capacity to decide how regulations should be applied in particular cases.

rezonings that amend the text or map of a zoning ordinance are normally site specific. Unlike typical legislative enactments, which are widely applicable, and which impact large numbers of parties, these rezonings rely on case-specific facts and often apply to a single party. What happens in practice is that the local legislative entity, through its exclusive power to rezone, renders a quasi-judicial decision limited to the sole applicant for rezoning. Reznik, *supra* at 261. (citations omitted).

To this end, the Court of Appeal's decision[6] rests upon an exaggerated partition between the local governmental bodies that enact and apply impact fees. In withholding the application of *Dolan's* analysis to the impact fee imposed upon Petitioner, the Court of Appeal casts a blind eye to the potential for "regulatory leveraging" that can easily take place at the legislative level. In reality, "[L]ocal government structure combines legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decisionmaking, making it difficult for courts to determine when a decision is sufficiently legislative in character." Reznik, *supra*, at 247-248. Thus, *Dolan* must be read in conformity with the realities of the local land use process in order to ensure the protection of all private property rights under the Constitution.

When *Dolan* is applied to all development exactions, regardless of their source, courts are spared the burden of sorting through the "legislative-adjudicative" morass and

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[6] The Court of Appeal adopted the "guidelines" from *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal.), *cert. denied*, 519 U.S. 929 (1996), which held that a development fee was subject to *Dolan's* heightened scrutiny because the city had exercised discretionary power in imposing and calculating the fee rather than doing so pursuant to legislative enactment.

property owners are accorded a fair measure of constitutional protection.

A. DOLAN'S ANALYSIS IS A LOGICAL FRAMEWORK UNDER WHICH TO TEST THE CONSTITUTIONALITY OF EXACTIONS IRRESPECTIVE OF WHICH BRANCH OF GOVERNMENT IMPOSES THEM

By its very nature, *Dolan's* "heightened scrutiny" test is well-conceived to evaluate the constitutionality of development exactions that are imposed either by legislative or quasi-adjudicative fiat.

Unlike "conventional" takings, which might result from either the government's actual physical invasion or occupation of property,[7] or the government's noninvasive, regulatory restriction of a property owner's intended use of the property,[8] the taking in *Dolan* concerned development conditions that required the property owner to "dedicate" a portion of her property in order to proceed with development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Building upon this Court's previous ruling in

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[7] Commonly referred to as a *per se* taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[8] Also generally known as a "regulatory" taking. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) for a list of three factors often used to test if a regulation has gone "too far" so as to become a taking; *See also, Agins v. City of Tiburon*, 447 U.S. 255 (1980) (compensable taking occurs where a regulation either "fails to substantially advance a legitimate state interest" or where it "deprives an owner of economically viable use of his property."). The exaction imposed in *Dolan* was both "regulatory" and "*per se*" in that the government conditioned approval on the property owner's obligation to dedicate private property for public use.

Nollan v. California Coastal Commission,[9] which required that there be an "essential nexus" between a government-conditioned dedication and the government's interest in imposing it, this Court in *Dolan* developed the "rough proportionality" test, which requires that there be a "rough proportionality" between the projected impacts of the development and the exaction imposed upon the property owner as a condition of development. *Dolan*, 512 U.S. at 391. While no precise mathematical calculation is required, the burden rests with the government to make "some sort of individualized determination" that the required dedication is related "both in nature and extent" to the impact of the proposed development." *Id.*

Essentially, *Nollan* ("essential nexus") and *Dolan* ("rough proportionality") constitute two separate tests in the takings analysis; however, because the essential nexus test announced in *Nollan* was further enhanced and refined by *Dolan*,[10] the legal standard discussed herein is referred to as "*Dolan's*" heightened scrutiny. Taken together, the tests represent an effective method under which to test the constitutionality of all land use exactions.

Applying heightened scrutiny to *both* legislatively-enacted and quasi-adjudicative exactions is logical and necessary. In a recent article emphasizing the merits of *Dolan*, Professor Fred Bosselman explains why *Dolan* makes sense:

> [T]he *Dolan* test is logical and works well, not because of the brilliant constitutional analysis of the Supreme Court, but because the Court

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[9] 483 U.S. 825 (1987).

[10] *See*, John J. Delaney, *What Does It Take To Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 Urb. Law 55 (1996).

> simply followed the body of law set down by most of the state courts before it ... it is logical in its outcome; and it seems to work reasonably well for both developers and local governments.

Fred P. Bosselman, *Dolan Works* in *Taking Sides on Takings Issues: Public and Private Perspectives*, 345, 353 (Thomas E. Roberts, editor, 2002).

Bosselman emphasizes that if the *Dolan* test is limited only to quasi-adjudicative exactions, it will provide a strong incentive for cities to impose all impact fees legislatively to reduce the risk associated with quasi-adjudicative exactions, and will encourage cities to pick any level of fee they choose because the *Dolan* test does not apply. This is likely to produce fees that are "unfair to some or all developers." Bosselman, *supra* at 348. Moreover, were *Dolan's* heightened scrutiny applicable only to quasi-adjudicative proceedings, cities would be encouraged to impose impact fees "without the careful cost-benefit analysis the *Dolan* test requires," which may produce arbitrary results for the developer. *Id.* Thus, unless *Dolan* is applied to legislatively-imposed impact fees or other exactions, vital private property rights will go unprotected solely because of an inexact distinction between local government entities.

B. OTHER COURTS HAVE APPLIED DOLAN EFFECTIVELY TO LEGISLATIVELY-ENACTED EXACTIONS

As Petitioner points out in its Petition for Writ of Certiorari, a host of courts have successfully utilized *Dolan's* heightened scrutiny test, or a comparable legal framework, to evaluate the constitutionality of legislatively-imposed development fee exactions:

Compare, Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000) ("dual rational nexus test" adopted by Ohio court for impact fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (Illinois court applied the "specifically and uniquely attributable test" to county transportation impact fee ordinance, requiring that local government demonstrate a direct proportionality between exaction imposed on new development and the specifically created need for additional traffic); and *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (In striking down legislatively-enacted rent stabilization ordinance as an unconstitutional taking, New York Court of Appeals references *Dolan* in stating that "[w]e are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners."). Pet. 7-9.

Dolan is a straight-forward, logical test. It injects a measure of clarity to a process that is often less than clear. By placing limitations on the type and form of exactions to which *Dolan* applies, the Court of Appeal improperly complicates the takings legal landscape. Certainly, a municipality should not be able to insulate itself from a takings challenge "merely by utilizing a different bureaucratic vehicle while expropriating its citizens' property." *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995).

II. DOLAN'S HEIGHTENED SCRUTINY SHOULD APPLY TO ALL GOVERNMENTAL EXACTIONS REGARDLESS OF WHETHER THE EXACTION TAKES THE FORM OF A PHYSICAL DEDICATION OR A NONPOSSESSORY IMPACT FEE

In addressing substantive questions of takings liability, this Court applies the same underlying principles whether real or monetary property is at issue. *See, Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (relying on a *Penn Central* analysis in determining whether a taking of monetary property had occurred); a*ccord, Phillips v. Washington Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting) (employing *Penn Central* analysis to interest income from client trust fund accounts). Moreover, as this Court has clearly articulated, the Constitution's Fifth Amendment taking guarantee prohibits government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Implicit in the Court's statement in *Armstrong* is the notion of proportionality. To the property owner or developer confronted with a governmental development condition that "exacts" a portion of his property, or mandates the payment of a development fee as a condition of approval, "proportionality" means everything, or it can mean nothing at all. From the property owner's perspective, there is often little difference between a requirement that he deed over his property through dedication or that he pay an impact fee as a cost of utilizing his property. Arguably, the payment of an impact

fee is the ultimate form of dedication.[11] What truly resonates with the property owner is the threat of deprivation or loss: whether through a dedication of property or a dedication of funds, that which is 'taken' goes to public use at the expense of the private property owner. The private property interest can be taken regardless of its form. As one court stated, "[J]ust as forced easements or zoning reclassifications can inhibit the desired use of property, an unreasonable impact fee may affect the manner in which a parcel of land is developed." *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355 (Ohio 2000).

Therefore, without the benefit of *Dolan's* heightened scrutiny analysis, and, more particularly, its "rough proportionality" test, property owners such as Petitioner are severely limited in challenging government-imposed impact fees that are neither fair, nor proportional. In fact, in *Ehrlich v. City of Culver City,*[12] a California case involving a financial exaction, this Court remanded the case "for further consideration in light of *Dolan*," because the Court recognized the logic in applying *Dolan's* heightened scrutiny to test *all* governmental exactions. Instructively, after this Court's remand of *Ehrlich*, the California Supreme Court rejected the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions, stating that, "[I]t matters little whether the local land use permit authority demands the actual conveyance of land or the payment of a monetary exaction." *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996).

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[11] *See*, Fred P. Bosselman, *supra*, at 347.
[12] 512 U.S. 1231 (1994).

While some might argue that *Ehrlich* and the California Supreme Court's subsequent decision in *San Remo Hotel L.P. v. City and County of San Francisco*[13] stand for the proposition that *Dolan* is limited to physical dedications, or only to those monetary exactions that are calculated and imposed on a discretionary and quasi-adjudicatory basis,[14] such a distinction based on the *form* of exaction is not rooted in the realities in which development exactions take place, nor on the history of this Court's treatment of real property and monetary takings cases.

And, it is important to bear in mind that in the regulatory takings context, "analysis of fundamental fairness in allocation of the burdens imposed, secures and implements the original meaning and purpose of the Fifth Amendment."[15] By adopting *Dolan's* heightened scrutiny as the proper constitutional test for all development exactions, a more fair allocation of burdens will indeed be achievable. After all, "[T]he notions of fairness and proportionality are at the heart of all regulatory taking claims."[16]

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[13] 41 P.3d 87 (Cal. 2002).

[14] *See Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002).

[15] Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions*, 34 Urb. Law 155 (2002).

[16] Ziegler, *supra*, at 155.

III. SPIRALING DEVELOPMENT IMPACT FEES IMPOSED BY LOCAL GOVERNMENTS ARE A LEADING CAUSE OF INCREASED HOUSING COSTS AND ARE A CONTINUING THREAT TO HOUSING AFFORDABILITY

Already encountering increases in the categories and amounts of development impact fees being imposed by local governments, property owners view the safeguards of *Dolan* as a necessary check on the government's unlimited regulatory powers. In fact, increased government regulations and attendant fees have been cited as one of the primary factors responsible for the recent spike in housing prices.

For example, a survey conducted recently by the NAHB found that 10 percent of the costs of building a typical new home can be attributed to regulation and regulatory delays and "fees associated with building, plumbing, electrical, ... higher impact analysis fees, and more." *See*, National Association of Home Builders, *Building a Balance: Housing Affordability & Environmental Protection*, (2002). Moreover, some of the fees that developers and builders have long paid, such as charges for tapping into water and sewer systems, have risen in cost disproportionately over the past twenty to thirty years. *Id.* Builders are also being required to pay a larger share of the cost of providing off-site infrastructure improvements such as new schools, fire stations, roads, and other public facilities that benefit an entire community, not just people living in newly-constructed homes. *Id.*

In a telling example, the Home Builders Association of Northern California recently reported that fees imposed in September, 2002, by the city of Livermore, California, and other local government agencies, amounted to more than $118,000 for several homes being built in a local subdivision, including a new fee of $38,000 per home for the preservation of farmland and open space.[17] This amounts to nearly two-thirds of the $183,280 median price of a home in the adjacent Central Valley of California.[18] Over the 30-year life of a mortgage, the Home Builders Association calculated that the development fees would add nearly $283,000 to the total cost for a home buyer.[19]

While the imposition of development impact fees and other exactions has become a reality for the building industry, unless local governments are obligated to more fully account legally for these fees, the costs of building homes will continue to soar. The lion's share of these costs will ultimately be passed along to consumers. Applying *Dolan* equally to all development exactions protects against the unconstitutional taking of private property through unlimited government regulation, and ensures that exactions are imposed proportionally.

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[17] *Home Buyers Face Skyrocketing Development Fees*, Nation's Building News (National Ass'n of Home Builders, Washington, D.C.), Aug., 19, 2002, at 8.

[18] *Id.*

[19] *Id.*

CONCLUSION

The National Association of Home Builders respectfully requests that this Court grant the Petition for a Writ of Certiorari to define the scope of *Dolan*.

DATED: November 21, 2002

Respectfully submitted,

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